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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-978

BRIDGETON HOSPITAL ASSOCIATION, *et al.*,

Petitioners,

vs.

JANE DOE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF NEW JERSEY HOSPITAL ASSOCIATION, *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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Interest of the *Amicus*

Amicus Curiae New Jersey Hospital Association respectfully files this brief in support of petitioners' request that a Writ of Certiorari issue from this Court to review

the judgment of the Supreme Court of New Jersey in the above-entitled cause.[1]

The New Jersey Hospital Association is a nonprofit corporation of the State of New Jersey, whose membership includes 87 nonsectarian nonprofit New Jersey hospitals. Since its inception in 1918 the Association has developed a particular expertise in the fields of hospital administration and hospital law. Over the course of those years it has applied its considerable experience towards the establishment of an efficient and professionally expert system of hospital care in New Jersey. To this end it has appeared as *Amicus Curiae* in various judicial proceedings throughout the state, and in fact, appeared as *Amicus Curiae* in this cause both at the trial level—where the court allowed it to participate as fully as any of the parties thereto—as well as before the New Jersey Supreme Court.

As essentially a trade organization, the New Jersey Hospital Association has never espoused a particular position nor otherwise sought to pass judgment upon the various religious or moral questions surrounding the issue of elective abortions. On the contrary, the Association has consistently supported the concept of institutional conscience, and, in fact, by resolution of its Board of Trustees gave its unqualified support to *N.J.S.A.* 2A:65A-1 *et seq.*, often referred to as the conscience law.

Thus, the New Jersey Hospital Association is deeply concerned with the New Jersey Supreme Court's decision in this matter, not only because it directs that those hos-

[1] Counsel for the Petitioners and the Respondents have consented to the filing of this brief, and true copies of letters verifying their consent have been, or will be filed with the Clerk.

pitals which do not now allow elective abortions must do so in the future, but, more importantly, it totally abrogates the concept of an institutional conscience as that concept applies to all nonsectarian hospitals, and as it is recognized in *N.J.S.A.* 2A:65A-1 *et seq.*

ARGUMENT

1. The New Jersey Supreme Court's decision represents an unfounded extension of this Court's decisions in *Bolton* and *Wade*.

Following this Court's decisions in *Doe* v. *Bolton*, 410 *U.S.* 179 (1973), and *Roe* v. *Wade*, 410 *U.S.* 113 (1973), nonsectarian nonprofit hospitals were left with what was believed to be a choice regarding their individual policies on the question of elective abortions. Subsequently, the New Jersey Legislature enacted *N.J.S.A.* 2A:65A-1 *et seq.* further confirming in the clearest of terms that hospitals and hospital personnel were free to reach their own determinations as to whether to provide, perform, or assist in the performance of, an abortion or sterilization.

In concluding that *N.J.S.A.* 2A:65A-2 and *N.J.S.A.* 2A:65A-3 do not apply to nonsectarian nonprofit hospitals, and that "[m]oral concepts cannot be the basis of a nonsectarian nonprofit eleemosynary hospital's regulations where that hospital is holding out the use of its facilities to the general public," (New Jersey Supreme Court Opinion, Petitioner's Appendix at A-10) the New Jersey Supreme Court relied upon this Court's rationale in the *Bolton* and *Wade* decisions. While those decisions clarified and substantiated a pregnant woman's right not to be statutorily precluded from obtaining an abortion, there

is no logical foundation for the conclusion that the hospitals here in question must therefore allow such abortions to take place in their facilities, notwithstanding established hospital policy to the contrary. This decision is not merely unprecedented, it is diametrically opposite to the factually analogous decision of the Court of Appeals for the Seventh Circuit in *Doe* v. *Bellin Memorial Hospital,* 479 *F.* 2d 756 (7th Cir. 1973). The *Bellin* court noted:

> "There is no constitutional objection to the decision by a purely private hospital that it will not permit its facilities to be used for the performance of abortions. We think it is also clear that if a state is completely neutral on the question whether private hospitals shall perform abortions, the state may expressly authorize such hospitals to answer that question for themselves." (479 *F.* 2d 759-60.)

Thus, the New Jersey Hospital Association fully concurs with the Petitioners, and submits that the *Bridgeton* decision has the potential impact of denying our 87 nonprofit nonsectarian member hospitals their constitutional right to due process of law by compelling them to perform elective abortions. (See discussion and cases cited by Petitioners at P-5).

2. The New Jersey Supreme Court's decision has undermined and confused well established constitutional principles delineating the parameters of "state action."

In reaching its decision, the court below held that by permitting a nonsectarian nonprofit hospital to choose—as a matter of hospital policy—whether or not it would allow its facilities to be used for elective abortions, the New Jersey conscience law as reflected in *N.J.S.A.* 2A:65A-1 *et seq.* ". . . clearly constitut(ed) state action . . . ." The court cited *Reitman* v. *Mulkey,* 387 *U.S.* 369 (1967) as authority for this proposition. (A-11).

Without further amplification, the court proceeded to determine from its conclusory premise that by statutorily permitting such a choice the State of New Jersey had frustrated "the Federal constitutional right to an abortion . . ." settled by this Court's decision in Wade, *supra.* Relying upon *Nyberg* v. *City of Virginia,* 495 *F.* 2d 1342 (8th Cir. 1974), appeal dismissed, 419 *U.S.* 891 and *Doe* v. *Hale Hospital,* 500 *F.* 2d 144 (1st Cir. 1974) *cert.* den. 420 *U.S.* 907 (1975) the court thereafter held that the statute thereby violates a woman's "constitutional guarantee" and hence cannot be applied to nonsectarian nonprofit hospitals (A-11, 12).

In weighing the impact of this determination it must initially be noted that neither the *Reitman* decision nor any of its progeny have gone so far as to hold that "state action" may be found where the state's posture is one of complete neutrality. More importantly, the Seventh Circuit's decision in *Bellin, supra,* at 479 *F.* 2d 760 specifically held that when a state takes such a neutral position ". . . it may *expressly* authorize such hospitals . . ." (emphasis added) to reach their own decision.

Additionally, the court below relied upon *Nyberg* and *Hale Hospital, supra,* without addressing the fact that neither of those decisions involved a dispute over whether "state action" was involved. In fact, the court in *Hale Hospital* specifically limited its holding to *public* hospitals by noting that the rights of "privately controlled" hospitals were not relevant to the questions there in issue. *Hale Hospital, supra,* at 500 *F.* 2d 146, n.2. Similarly, in *Nyberg* the court noted that the parties did not even contest the question of "state action", as a public hospital was involved. *Nyberg, supra,* at 495 *F.* 2d 1345, n.3.

The New Jersey Hospital Association respectfully submits that by failing to provide a definitive constitutional basis for its action, the New Jersey Supreme Court has left all nonsectarian nonprofit hospitals without guidance as to what now constitutes "state action." This situation is compounded by the fact that plaintiffs below based their constitutional attack on "state action" assertedly founded upon the receipt of ". . . federal, state, county and municipal financial aid . . . by the hospitals. . . ." (A-3). Unfortunately, the court's opinion offered no explanation as to what part the receipt of these funds played in its ultimate decision, and thereby further beclouded the "state action" issue.

Similarly, the decision implicitly undermines the seemingly clear mandate of the "Church Amendment" (42 U.S.C.A. 300a-7(a)), which precludes a court or administrative body from requiring a hospital to make its facilities available for elective abortions simply because it receives federal funds under the so called "Hill-Burton Act." As was noted in *Chrisman* v. *Sisters of St. Joseph of Peace,* 506 *F.* 2d 308 (9th Cir. 1974), Congress clearly intended that receipt of such funds could not be advanced as a basis for a finding of "state action" where a hospital

has prohibited elective abortions ". . . on the basis of religious beliefs or moral convictions." *Id.* at 310.

The New Jersey Supreme Court's decision with respect to the question of "state action" affects not only the right of some nonsectarian nonprofit hospitals to refuse to permit elective abortions, but has ramifications far beyond this limited issue for all nonsectarian nonprofit hospitals. The New Jersey Hospital Association respectfully urges that this Court grant the Writ here sought in order that the above noted inconsistencies on the substantial constitutional questions involved in this matter may be finally determined.

CONCLUSION

For the above reasons and those set forth in the Petition for Writ of Certiorari, *Amicus Curiae* New Jersey Hospital Association respectfully urges this Court to grant certiorari to review the judgment of the New Jersey Supreme Court in this case.

Respectfully submitted,

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